

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL HALE,

Plaintiff-Appellant,

v

AUBURN HEIGHTS APARTMENTS, G.D.E
GEORGIA, INC. and COLONIAL
LAMPLIGHTERS, d/b/a G.D.E.
RENOVATIONS,

Defendants-Appellees,

and

J.R. NAVARRO FENCING,

Defendant.

UNPUBLISHED

August 23, 2002

No. 233131

Oakland Circuit Court

LC No. 00-020314-NO

Before: White, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from circuit court orders granting defendants' motions for summary disposition. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

The parties did not dispute in the trial court that plaintiff was an invitee. We therefore decline to consider Colonial's argument on appeal that plaintiff was a licensee. *Camden v Kaufman*, 240 Mich App 389, 400, n 2; 613 NW2d 335 (2000). A landowner is subject to

liability for physical harm caused to his invitees by a condition on the land only if the owner (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that it involves an unreasonable risk of harm to his invitees; (b) should expect that his invitees will not discover or realize the danger or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect his invitees against the danger. *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 432-433; 542 NW2d 612 (1995). This duty is not absolute. *Douglas v Elba, Inc*, 184 Mich App 160, 163; 457 NW2d 117 (1990). It does not extend to conditions from which an unreasonable risk of harm cannot be anticipated or to open and obvious dangers. *Id.*; *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 6; 535 NW2d 215 (1995).

An open and obvious danger is one that is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it, i.e., it is something that an average user with ordinary intelligence would be able to discover upon casual inspection. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). A landowner does not owe a duty to protect invitees from any harm presented by an open and obvious danger unless special aspects of the condition, i.e., something unusual about the character, location, or surrounding conditions, make the risk of harm unreasonable. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-617; 537 NW2d 185 (1995). However, “only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.” *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001).

In this case, plaintiff fell from an unguarded, second-floor balcony on an apartment building. In *Woodbury v Bruckner (On Remand)*, 248 Mich App 684, 694; ___ NW2d ___ (2001), this Court held that that the danger of falling off the balcony was open and obvious but, given the lack of guardrails, the height of the balcony, and the inherent dangerousness of the condition, there was a question of fact whether the danger remained unreasonable. Accordingly, we find that the trial court erred in granting defendants’ motions for summary disposition.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Kathleen Jansen